MOTION FILED
JAN 14 1977

Nos. 75-1126 and 75-1385

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

TRANS WORLD AIRLINES, INC.,
Petitioner,

v.

LARRY G. HARDISON,
Respondent.

INTERNATIONAL ASSOCIATION OF MACHINISTS,
Petitioner,

v.

LARRY G. HARDISON,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

JAY S. SIEGEL
SIEGEL, O'CONNOR AND KAINEN
60 Washington Street
Hartford, Connecticut 06106

Of Counsel:

MCGUINESS AND WILLIAMS
ROBERT E. WILLIAMS
DOUGLAS S. MCDOWELL
1747 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

INDEX

	Page
MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*	1
STATEMENT OF THE CASE	6
QUESTIONS PRESENTED	6
SUMMARY OF ARGUMENT	7
ARGUMENT	9
I. THE RELIGIOUS ACCOMMODATION AMENDMENT FOSTERS PREFERENTIAL TREATMENT AND GENERATES A HOSTILE ENVIRONMENT CONTRAVENING THE BASIC PURPOSE OF TITLE VII	9
II. THE STATUTE EXCUSES EMPLOYERS FROM THE DUTY OF ACCOMMODATION IF IT REQUIRES VIOLATING A COLLECTIVE BARGAINING AGREEMENT	13
III. THE FIRST AMENDMENT IS A CONSTITUTIONAL BAR TO ANY GOVERNMENT-IMPOSED OBLIGATION ON EMPLOYERS IN TITLE VII TO ACCOMMODATE THE RELIGIOUS PRACTICES OF SOME EMPLOYEES TO THE DETRIMENT OF OTHERS IN THE WORK FORCE	16
A. The First Amendment Requires Government Neutrality In The Area Of Religion	17
B. No Conflict With The Free Exercise Clause Is Involved Here	18
C. Hardison Seeks A Discriminatory Preference In Furtherance Of His Religious Beliefs	19
IV. CONCLUSION	22

TABLE OF AUTHORITIES CITED

Cases:	Page
Cantwell v. *Connecticut*, 310 U.S. 296 (1940)	22
Committee for Public Education v. *Nyquist*, 413 U.S. 756 (1972)	18, 21
Cummins v. *Parker Seal Co.*, (C.A. 6) 516 F.2d 544, 10 FEP Cases 974 (1975)	10
Dewey v. *Reynolds Metals Co.*, 402 U.S. 689, 3 FEP Cases 308 (1971)	7, 16
Gillette v. *United States, et al*, 401 U.S. 437 (1971)	17
Griggs v. *Duke Power Co.*, 401 U.S. 424, 3 FEP Cases 175 (1971)	10
Hardison v. *Trans World Airlines*, 527 F.2d 33, 11 FEP Cases 1121 (1975)	15
McGowan v. *Maryland*, 366 U.S. 420, 6 L.Ed.2d 393, 406 (1961)	17, 20
NLRB v. *J. I. Case*, 321 U.S. 332, 14 LRRM 501 (1944)	14
Parker Seal Company v. *Cummins*, —— U.S. ——, 13 FEP Cases 1178 (1976)	16
Reid v. *Memphis Publishing Co.*, (C.A. 6) 521 F.2d 512; 11 FEP Cases 129 (1975); cert. den'd, —— U.S. ——, 13 FEP Cases 1408 (1976)	11
Sherbert v. *Verner*, 374 U.S. 398 (1963)	18
Stimpel v. *State Personnel Board of the State of California*, 85 Cal.Rep. 797, 6 Cal.App.3d 206 (1970); cert. den'd, 400 U.S. 952 (1970)	12
Walz v. *Tax Commission*, 397 U.S. 664, 705 (1970)	20, 21
Wisconsin v. *Yoder*, 406 U.S. 205 (1972)	20
Young v. *Southwestern Savings and Loan Assn.*, (CA. 5) 509 F.2d 140, 10 FEP Cases 522 (1975)	12

Statutes:

Civil Rights Act of 1964, Title VII, [42 U.S.C. 2000e, *et seq.*]	6, 7, 8, 11, 14, 16, 18
Section 701(j) [42 U.S.C. 2000e(j)]	6, 7, 8, 10, 15, 17
Section 703(a)(1) [42 U.S.C. 2000e-2(a)(1)]	9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

Nos. 75-1126 and 75-1385

TRANS WORLD AIRLINES, INC.,
Petitioner,
v.
LARRY G. HARDISON,
Respondent.

INTERNATIONAL ASSOCIATION OF MACHINISTS,
Petitioner,
v.
LARRY G. HARDISON,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

MOTION FOR LEAVE TO SUBMIT BRIEF AS *AMICUS CURIAE*

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court

Pursuant to Rule 42(3) of the Rules of this Court, the Equal Employment Advisory Council respectfully moves this Court for leave to file the accompanying

brief as *Amicus Curiae* in support of the position of the petitioners in this case. In support of this motion, the above-named Council shows as follows:

1. This motion for leave to file is necessary under Rule 42(3) because counsel for the respondent has advised that consent for the filing of this brief would not be granted. Counsel for the petitioners have given their written consent, which are on file with the Clerk of this Court.

2. The Equal Employment Advisory Council ("EEAC") is a voluntary, non-profit association, organized as a corporation under the laws of the District of Columbia. Its membership includes a broad spectrum of employers from throughout the United States, both labor organized and unorganized, including individual employers, trade and industry associations. The principal goal of EEAC is to represent and promote the common interest of employers and the general public in the development and implementation of sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices.

3. Because of this interest, the EEAC has sought and been granted permission to file briefs as *amicus curiae* in other matters before this Court, including *Guy* v. *Robbins & Myers, Inc.* (Docket No. 75-1264 and 75-1276); *T.I.M.E.-D.C., Inc.* v. *Rodriguez* (Docket No. 75-672); and *East Texas Motor Freight System, Inc.* v. *Jesse Rodriguez, et al.* (Docket No. 75-718).

4. The questions presented for review in this case raise issues of substantial importance to the *Amicus Curiae* and the outcome thereof will have a major

impact upon employers throughout the country. As such, the members of EEAC have a direct interest in the issues presented for the Court's consideration in this case, as to the constitutionality of the religious accommodation requirement in Title VII, the nature and scope of any lawful duty to accommodate, and its practical effect upon legitimate employer business practices and collective bargaining agreements.

5. The *Amicus* filing this motion has broad knowledge concerning the application of the religious accommodation proviso involved in this case to employers generally. Because of this knowledge, the *Amicus* EEAC is uniquely situated to brief the court on the practical as well as legal aspects of the issues presented here.

WHEREFORE, it is respectfully moved that the above-named Council be granted leave to submit the accompanying brief as *Amicus Curiae* in this case.

Respectfully submitted,

JAY S. SIEGEL
SIEGEL, O'CONNOR AND KAINEN
60 Washington Street
Hartford, Connecticut 06106

Of Counsel:

MCGUINESS AND WILLIAMS
ROBERT E. WILLIAMS
DOUGLAS S. MCDOWELL
1747 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

Nos. 75-1126 and 75-1385

TRANS WORLD AIRLINES, INC.,
Petitioner,

v.

LARRY G. HARDISON,
Respondent.

INTERNATIONAL ASSOCIATION OF MACHINISTS,
Petitioner,

v.

LARRY G. HARDISON,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

STATEMENT OF THE CASE

This case is before the Court on appeal from a decision of the Court of Appeals for the Eighth Circuit holding that Petitioner TWA violated Title VII on the grounds of religious discrimination when it discharged Respondent Hardison for refusing to work Saturdays because it conflicted with his observance of the Sabbath. The Court held there was a duty on the employer's part under Section 701(j) to accommodate work assignments and the schedules of other employees to the religious practices of Respondent.

The facts as set forth in the brief of the petitioners in this case are sufficient for the *Amicus* to present its position as a friend of the Court on the appeal. EEAC's only additional observation is that there appears to be a serious difference between the facts as found by the District Court and those set forth in the opinion of the Court of Appeals as to the extent to which Petitioner TWA endeavored to accommodate Respondent Hardison. We leave to TWA to urge its arguments upon the Court as to the proper scope of judicial review of the District Court's findings under Rule 52(a) at the Circuit Court level as set forth in their petition for *certiorari*, noting, however, agreement with their general position that the appellate court should not engage in *de novo* consideration where there has been a hearing or trial in the district court.

THE QUESTIONS PRESENTED

1. Whether the duty of religious accommodation imposed under Section 701(j) of Title VII compels

employers and labor organizations to take action inconsistent with the provisions of *bona fide* negotiated collective bargaining agreements?

2. Does the requirement of Title VII providing preferential treatment for religionists by requiring an employer to accommodate business operations to conform to his employees' personal observance of individual religious practices violate the Establishment Clause of the First Amendment?

SUMMARY OF ARGUMENT

This case is before the Court after two previous attempts to resolve the complex constitutional issues posed both ended in the Court being deadlocked.[1]

The present appeal presents the matter in a somewhat broader vein in that, in addition to the constitutional issue, it also focuses upon the impact of the Title VII religious accommodation proviso—42 USC 2000e(j)—upon collective bargaining agreements and the national labor policy. The Court below appears to have failed to grasp the significance of this issue as well as the true extent of the constitutional impediment involved. The present case should therefore resolve the long-standing statutory, policy, and constitutional questions that have surrounded efforts to compel employers to rearrange their business and work practices in order to meet the congressional demand for accommodation of the

---

[1] *Dewey* v. *Reynolds Metals Co.*, 402 U.S. 689, 3 FEP Cases 308 (1971) and *Parker Seal* v. *Cummins*, —— U.S. ——, 13 FEP Cases 1178 (1976).

personal observance of religious practices by employees.

While Title VII, in its basic form, was a major piece of social legislation designed to bring about *uniformity* of treatment for all persons in the Nation's work force, the 1972 religious accommodation amendment poses something of a dilemma. For the amendment, as construed by the court below, goes farther and instead fosters a medium of preferential consideration that works to the detriment of the majority of employees who are not seeking special working conditions because of their religious affiliations.

Compounding the matter is the problem of the employer who has entered into a collective bargaining agreement under the Railway Labor Act or National Labor Relations Act, as it also vainly seeks to comply with the accommodation mandate in Section 701(j). This situation has brought about serious conflicts between various of the Nation's labor policies which the Congress has apparently left for the Court to sort out.

The Court is initially urged to hold that the Court of Appeals has "overdefined" the accommodation proviso to create the very type of preferential treatment the statute was designed to eradicate. The *Amicus* EEAC further urges that the Court excuse an employer from having a duty to accommodate if it would result in violating a *bona fide* collective bargaining agreement, absent Union consent or waiver.

Finally, the matter should not end there for, the above considerations aside, the proviso, as interpreted,

conflicts with the First Amendment. The government seeks to compel action by private employers that will aid members of various sects to follow their respective religious practices to the detriment of coworkers who follow other religions or none at all. Simply put, this statutory enactment aids religion generally and violates the constitutionally required stance of government neutrality. It transgresses into an area that the Court has long viewed with great caution, yet its absence from the statute would in no way inhibit a single citizen from freely following his or her chosen religious beliefs under the Free Exercise Clause. Freedom of religion means the right to believe in any religion or no religion. This Court's striking down of the accommodation proviso leaves this fundamental tenet of our system fully intact. It is for these reasons that this Court should reverse the decision of the Circuit Court below.

ARGUMENT

I. THE RELIGIOUS ACCOMMODATION AMENDMENT FOSTERS PREFERENTIAL TREATMENT AND GENERATES A HOSTILE ENVIRONMENT CONTRAVENING THE BASIC PURPOSE OF TITLE VII

Title VII was the major Congressional commitment of this century to eradicate from the employment market, *inter alia*, those discriminatory employment practices in the area of religion that still lingered in our society after nearly 200 years of religious freedom. Section 703(a)(1), 42 U.S.C. 2000 e-2(a)(1), of the 1964 statute expressly prohibited discrimination on the grounds of religion.

As applied in this case, the 1972 amendment enlarging the definition of religion in Section 701(j), 42 USC 2000e(j), changed the original thrust of the legislation as expressed by this Court in *Griggs* v. *Duke Power Co.*: "Discriminatory preference for any group, minority or majority, is precisely and only what Congress proscribed." 401 US 424, 431, 3 FEP Cases 175, 177. Instead of merely seeking to prevent an employer from denying employment to someone on account of their religious beliefs, the Act, as construed below, places the employee in the position of being able to insist on creating special circumstances of employment, based upon the practices followed by his or her particular religion. Read thusly, the 1972 accommodation amendment to Section 701 altered not only the basic structure of Title VII, but gave it a cast that raises serious questions whether the Act has become a vehicle for fostering discriminatory practices as opposed to eliminating them. "Rather than 'putting teeth' into the Act, it [the amendment] mandates religious discrimination, thus departing from the Act's basic purpose." (Cellebresse, J. dissenting), *Cummins* v. *Parker Seal Co.*, (CA 6) 516 F.2d 544, 556, 10 FEP Cases 974, 986 (1975).

Efforts at accommodation result in discrimination in favor of the demanding religionist and against all others in the work force. Yet, the purpose of Title VII is to bring an end to discrimination by requiring uniform treatment without regard to religious beliefs of employees. Ironically, it would seem that accommodation of religion brings into play an inherent element that is at serious odds with the attainment of the very goals of the statute.

In the present case, Hardison is asking that he be singled out for special treatment from all others in the TWA work force *because* of his religion. The result of according him this special status can well lead to morale problems with the other employees who are forced to adjust their work patterns to meet his demands. Dissension and a sense of hostility toward both Hardison as the accommodated employee, and the employer, must be an anticipated by-product of the entire process, for in fact it is an imposition on them for Hardison to be accommodated.[2]

Further, the employer may be faced with conflicting demands by other religionists. For example, would it have been a violation of Title VII if TWA had rejected the demands of a second employee, an Orthodox Jew, working in Hardison's department, and demanding the same type of relief from Saturday work in order to follow his religion's practices? The door of accommodation cannot be opened only for the first religionist. Where there is a conflict in accommodating the religious practices of two or more employees, and only one can be satisfied because of

---

[2] Nothing herein should be construed as preventing an employee from seeking his employer's approval of substitute or exchange arrangements made with his fellow employees. But *Cf. Reid* v. *Memphis Publishing Co.*, (C.A. 6) 521 F.2d 512, ——, 11 FEP Cases 129, 132 (1975) cert. den'd, —— U.S. ——, 13 FEP Cases 1408 (1976), where the Circuit Court noted that in order for Reid to be accommodated, "another copyreader who had seniority over Reid would have to be involuntarily assigned to take his place on every other Saturday, even though the other man did not desire to work on that day".

business considerations, which one should be given preference?

The Court of Appeals below essentially considered the impact of accommodation on TWA's business operations in the context of only a single employee, Hardison, and without real regard to other employees at the Company's operations. But to let it rest there is to view the matter in a vacuum. Application of the statute is not restricted solely to the major religious groups but embraces all religious orders, each with its own particular beliefs and practices. It also includes the non-religious. *Young* v. *Southwestern Savings and Loan Assn.*, (CA 5) 509 F.2d 140, 10 FEP Cases 522 (1975). To avoid violating it, under the Respondent's view, an employer is thus required to accommodate the demands of every religionist in its work force. This is an intolerable burden. *Stimpel* v. *State Personnel Board of the State of California*, 85 Cal.Rep. 797, 6 Cal.App.3d 206 (1970); cert. den'd. 400 US 952 (1970).

The difficulty with the duty created under the proviso, as interpreted by the Court of Appeals below, is that it places an almost impossible burden on the average employer who is not otherwise discriminating against the religious beliefs or practices of its employees in violation of the basic purpose of the Act, but merely trying to run his establishment.[3] Although the Court of Appeals suggested

[3] This is particularly true in the case of some businesses, such as public utilities, or quasi-public utilities as TWA, that are required by their very nature or government fiat to operate 24 hours a day, seven days a week, so as to provide either uninterrupted service or service on a comparable continuous basis.

that TWA might simply have operated shorthanded when Hardison's religious practices made him unavailable to work his scheduled shifts, the *Amicus* EEAC submits that this would *presumptively* create an undue hardship on the employer. That TWA assigned Hardison to work the shifts in question and was prepared to pay him to do so is sufficient to establish that his services were needed.

The decision below, however, places the employer in a position of constantly having to arrange and rearrange its business operations in a never-ending series of adjustments that can only be highly disruptive and counter-productive to its efforts at running on a business-like and efficient basis.[4]

The irony of the decision below is that far from pushing the religion of an employee into the background in connection with employment, it actually brings it to the forefront and focuses attention on it. This result cannot be reconciled with the dominant purpose of Title VII.

II. THE STATUTE EXCUSES EMPLOYERS FROM THE DUTY OF ACCOMMODATION IF IT REQUIRES VIOLATING A COLLECTIVE BARGAINING AGREEMENT

In the present case, both Petitioners, TWA and the International Association of Machinists, have expressed great concern over whether the duty requires an employer to violate the provisions of a negotiated collective bargaining agreement as a "rea-

[4] Many businesses in this Country are labor intensive in cost and these employers' profit margins are dependent upon maximum utilization of their work forces to achieve high productivity and minimize inflationary excessive costs.

sonable" effort at accommodation. EEAC shares this concern on behalf of those of its members who have entered into such agreements under the National Labor Relations Act or the Railway Labor Act.

Nowhere in Title VII is it suggested that employers and unions are required to rewrite labor contracts to meet limitations and working conditions laid down by individual employees working for them. That result, however, is the strong implication of the Court of Appeals' decision below. But no evidence has surfaced to show that Congress intended to modify, on a general basis, the underlying purposes of the nation's two collective bargaining statutes. When an employer settles on the "bargain" with the employees' union representative, it is with the knowledge that, for the term of the agreement, certain ground rules have been fixed. As such, it enables the employer to plan work schedules, make manpower assignments, and generally endeavor to manage the business in workmanlike fashion. It depends upon the stabilizing force of the collective bargaining agreement to help it plan and function efficiently.

On the union side, the employees in the bargaining unit vote to accept an agreement with advance knowledge as to the "wages, hours, and other conditions of employment" offered by the employer for the term of the contract. Acceptance seals the bargain on their end. Individual bargaining is prohibited. *NLRB* v. *J. I. Case*, 321 US 332, 14 LRRM 501 (1944). The Court of Appeals evidenced little concern over this aspect of the case and the national labor policy on enforcement of collective bargaining agreements.

Discussing the alternatives that it felt were open to TWA in meeting the statutory duty of accommodation, the Court conceded that under the labor agreement, "Every swap was technically at risk because the exchange was subject to the right of a senior worker to bump into the opening", 527 F.2d 33, 41, 11 FEP Cases 1121, 1126 (1975).[5]

EEAC submits that this Court here should clearly rule that employers are excused from the duty of religious accommodation under Section 701(j) when the religionist's requested accommodation conflicts with the provisions of a *bona fide* collective bargaining agreement, negotiated in good faith and otherwise neutral in content on its face. This is the plain meaning of Section 703(h) that expressly permits the application of "different terms, conditions or privileges of employment pursuant to a *bona fide* seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin". Such language is evidence Congress did not intend to cause wholesale disruption of the collective bargaining process. Where there is no intent to discriminate because of religion on the part of the parties to a labor contract, the Court should hold that accommodation creates an undue hardship if it requires an employer to take any ac-

---

[5] However, it was quite willing to leave the employer in such vulnerable posture, noting only that the issue of the "proper relationship between a *bona fide* seniority system and the requirement of reasonable accommodation has not yet been settled by the Supreme Court."

tion that will be contrary to the terms of such contract, absent Union consent or waiver.[6]

The contrary holding below interfers with the contractual rights of the other employees and places a heavy burden on the employer that can properly be considered as an undue hardship sufficient to excuse it. Reversal of that holding would not do violence to the primary protection accorded religion under Title VII. It would, however, reassure parties seated around the negotiating table that they are not writing a contract with disappearing ink.

III. THE FIRST AMENDMENT IS A CONSTITUTIONAL BAR TO ANY GOVERNMENT-IMPOSED OBLIGATION ON EMPLOYERS IN TITLE VII TO ACCOMMODATE THE RELIGIOUS PRACTICES OF SOME EMPLOYEES TO THE DETRIMENT OF OTHERS IN THE WORK FORCE

Like *Dewey* v. *Reynolds Metals Co.*, 402 US 689, 3 FEP Cases 308 (1971) and *Parker Seal Company* v. *Cummins*, —— US ——, 13 FEP Cases 1178 (1976), this case raises a constitutional issue that goes to the very core of the Establishment Clause of the First Amendment. It requires the essential inquiry whether the religious accommodation proviso violates the constitutionally-required neutral stance of the government.[7]

---

[6] Nothing in the record of this case below appears to challenge the non-discriminatory nature of the collective bargaining provisions before the Court here.

[7] The Court is urged to adopt the cogent dissent of Judge Celebrezze in *Parker Seal Co.* v. *Cummins, supra,* at 516 F.2d 554, 10 FEP Cases 983 on the unconstitutionality of the accommodation amendment.

A. The First Amendment Requires Government Neutrality In The Area Of Religion.

The reported decisions of this Court are not barren as to the intended scope of the First Amendment to the Constitution. Explicit and well known, its basic philosophy as regards religion is simple. The government must not establish, favor, or support any religion. This Court expressly reaffirmed such philosophy in *McGowan* v. *Maryland,* 366 US 420, 443, 6 L.Ed.2d. 393, 406 (1961), emphasizing that under the First Amendment the Federal Government cannot "pass laws which aid one religion, aid all religions, or prefer one religion over another".

Neither support nor hostility, but neutrality, is the goal of the religion clause. *Gillette* v. *United States, et al,* 401 US 437 (1971). As Justice Marshall, speaking for the Court in *Gillette* observed:

> ". . . but the Establishment Clause stands at least for the proposition that when government activities touch on the religious sphere they must be secular in purpose, evenhanded in operation and neutral in impact." *Supra,* 401 US 450.

The Court's inquiry therefore must begin from this critical focal point. Applied to the statute here, it raises the question whether Congress has violated the government's obligation of neutrality by mandating that employers *must* exert efforts to restructure working conditions at their business to accommodate any conflicts with the religious "practices" of employees working there.[8]

---

[8] The choice of the word "practices" in 701(j) is particularly revealing for it indicates a Congressional awareness that

The language of the proviso and the attendant guideline, on their face, do not purport to be neutral, even in tone, for they require the taking of action by one of the parties touched. Thus, the initial reaction has to be that the scales are being decidedly tipped away from a neutral stance of government which is required by the First Amendment.

B. No Conflict With The Free Exercise Clause Is Involved Here.

The Court has acknowledged in recent years that "tension inevitably exists between the Free Exercise and the Establishment Clauses". *Committee for Public Education* v. *Nyquist*, 413 US 756 (1972). The Court in *Nyquist* went on to note that "it may often not be possible to promote the former without offending the latter". *Supra* at 413 US 788. But Hardison's case here does not reach the purview of the Free Exercise Clause for nothing has been done, either by TWA or the Union, to impede or otherwise infringe upon his *right to believe* in his church or follow any of its tenets.[9] Absent the accommodation proviso, Hardison is totally free to remain a conscientious follower of the World Wide Church of God.

---

it was going beyond the protection of the exercise of freedom of mere religious beliefs.

[9] This distinction renders *Sherbert* v. *Verner*, 374 U.S. 398 (1963) inapposite here. Additionally, as Justice Brennan observed in *Sherbert*, recognition of the claimant's right to unemployment benefits did not "serve to abridge any other person's religious liberties". *Supra* at 374 U.S. 409.

Nor is he being compelled to choose between working and his religion. He is not being required to abandon his religious beliefs and nothing prevents him from seeking a position that does not conflict with *his* restrictions on availability for work. But when the Congress, by legislative enactment, advises TWA it must rearrange its business affairs, as well as impose upon its other employees, all to accommodate a situation generated by Hardison's desire to exercise his right to adhere to his freely chosen religious practices, the government transgresses into the forbidden zone delineated by the Establishment Clause and seeks to favor him in support of his religion.

C. Hardison Seeks A Discriminatory Preference In Furtherance Of His Religious Beliefs.

Respondent Hardison converted to his religion after he had been working at the employer's business for several years. He thus seeks the support of the government, under Title VII, to compel his employer, TWA, to rearrange its operations and the scheduling of its other employees so that he can engage in various practices dictated by the religious group to which he now subscribes. It is important to note again that nothing has been done to him which otherwise prevents his freely following that religious order. He has not been compelled to give up his religion, nor to abandon his beliefs. What he asks this Court to now hold is that his employer must make a job available to him on *his* terms, i.e., consistent with the "practices" observed by his religious affiliation. The *Amicus* EEAC submits that this constitutes, in effect, a demand for preference in sup-

port of religion and contrary to the Establishment Clause of the First Amendment.

If granted, the effect of such demands is to advance his religious sect at the expense of other employees in the plant, including those who profess to follow no religion at all. The essence of an obligation to accommodate in this case necessarily carries with it preferential treatment for the employee seeking it. But as noted earlier by this Court, the Conress cannot pass laws which prefer one religion over another. *McGowan* v. *Maryland*, *supra*.

The basic effect of the religious accommodation requirement is unconstitutionally to advance the position of one religionist to follow his or her religious beliefs vis-a-vis that of every other employee in the particular employer's operations. Hardison here actually seeks special treatment *because* of his religion, a result that appears to be the very antithesis of the neutral approach required of the government. "A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion." *Wisconsin* v. *Yoder*, 406 US 205, 220 (1972).

Within the framework of reference alluded to by Justice Harlan in his concurring opinion in *Walz* v. *Tax Commission*, 397 US 664 (1970), the degree of involvement sought by Hardison here would be a "continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement". *Supra* at p. 705. For as Justice Harlan had concluded:

> "In determining whether a particular government action breaches the establishment clause prohibition we must look not only at the executive purpose but also at the end result. We must be sure that the end result—the effect—is not an excessive government entanglement with religion. The test is inescapably one of degree." *Supra* at p. 704.

The religious accommodation urged by Respondent cannot be made by this Court without unconstitutionally granting preferential treatment to employees holding religious beliefs as opposed to those possessing atheistic or non-orthodox beliefs. It requires employers to award a generally-coveted employment benefit —weekend time off—to those who desire it for religious reasons, to the detirment of others who prefer not to work weekends for secular reasons.

The religious accommodation requirement in Title VII gives aid and support in the establishment of an employee's self-imposed requirement to adhere to his religious practices. It clearly fails to "pass muster" under the tripartite test enunciated by this Court in *Committee for Public Education* v. *Nyquist*, *supra*. From the legislative history, the statute is non-secular in purpose. Further, its primary effect is to advance religion and, as noted earlier, it enmeshes the government in a briar patch of regulation and surveillance. As such, failing to meet the *Nyquist* standards, it must fall. Prohibited by the First Amendment, it may not be lawfully advanced by the Congress even under the otherwise welcome standard of equal employment opportunity.

As this Court has observed in *Cantwell* v. *Connecticut*, 310 US 296 (1940), the First Amendment embodies two concepts: freedom to believe and freedom to act. "The first is absolute, but in the nature of things, the second cannot be." *Supra*, at 310 US 303-4. In asking the support of the government under Title VII, to compel other persons to accommodate their ways to the pattern of his religious beliefs, Hardison necessarily calls for the involvement of government to a degree that squarely contravenes the ban of the Establishment Clause. The Court, however reluctantly, must decide against him.

IV. CONCLUSION

For the reasons stated above, the *Amicus Curiae* urges that the decision of the Court below should be reversed and judgment entered in favor of the Appellants.

Respectfully submitted,

JAY S. SIEGEL
SIEGEL, O'CONNOR AND KAINEN
60 Washington Street
Hartford, Connecticut 06106

Of Counsel:

MCGUINESS AND WILLIAMS
ROBERT E. WILLIAMS
DOUGLAS S. MCDOWELL
1747 Pennsylvania Avenue, N.W.
Washington, D.C. 20006